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Consolidated Rules of Practices Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 22, 80, 168, 226

[FRL 1337-3]

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rules of practice.

SUMMARY: This document sets forth consolidated rules of practice to be followed by parties litigating administratively assessed civil penalties and revocations or suspensions of permits under certain statutes administered by EPA. These statutes are listed in § 22.01(a) of the consolidated rules. The consolidated rules are designed to accomplish two purposes. The first is the development of a common set of procedural rules for several programs in order to reduce paperwork, inconsistency, and the burden on persons regulated. The second is the improvement of formal administrative adjudicatory procedures through substantive revisions.

DATE: These rules govern all adjudicatory proceedings described in § 22.01(a) for which a complaint is filed after April 9, 1980.

FOR FURTHER INFORMATION CONTACT: Steve Leifer (EN-342), Pesticides and Toxic Substances Enforcement Division, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, 202-755-0970.

SUPPLEMENTARY INFORMATION: These consolidated rules of practice govern all adjudicatory proceedings for the assessment of a civil penalty or for the revocation or suspension of a permit authorized by the statutory provisions listed in § 22.01(a)(1)-(5). The consolidated rules replace existing rules of practice promulgated under section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 40 CFR Part 168, section 211 of the Clean Air Act, 40 CFR Part 80.301-332, and section 105 of the Marine Protection, Research, and Sanctuaries Act (Ocean Dumping Act), 40 CFR Part 226. They are the initial rules of practice promulgated in final form under section 3008 of the Solid Waste Disposal Act (SWDA) as amended by the Resource Conservation and Recovery Act (RCRA) and section 16 of the Toxic Substances Control Act (TSCA).

However, the rules in their final form no longer cover revocation of permits issued under RCRA. This does not reflect any change in EPA's position that a formal evidentiary hearing is required for such revocation. However, since these rules were proposed for comment, EPAhas poposed for comment and is now preparing for final promulgation, consolidated permit regulations under which the permit procedures for four EPA permit programs, including RCRA, will be coordinated as much as possible. One of the permit programs covered, the NPDES program under the Clean Water Act, already provides for revocation of permits through a formal evidentiary hearing.

EPA's current intention is to use the NPDES hearing procedures, with any necessary changes, for revocation of RCRA permits as well. Comments on these regulations will be reconsidered in that context. This will allow all the procedures for changing RCRA permits to be contained in the consolidated permit regulations. In addition, the consolidated permit hearing procedures are more adapted to deal with major policy problems than these regulations, and RCRA revocation proceedings appear likely to raise such issues. EPA will make a final decision on this point when the consolidated permit regulations are promulgated.

RCRA civil penalties will still be assessed through the Part 22 procedures.

The consolidated rules of practice were published in interim and proposed form on August 4, 1978 (43 FR 34730). The rules were interim with regard to TSCA, since there were no rules of practice in place to guide proceedings which were arising under the toxics program. The remaining programs either had rules of practice in place or did not expect to conduct administrative adjudications in the near future. Thus the consolidated rules were proposed with respect to the FIFRA, RCRA, Mobile Sources, and Ocean Dumping programs.

Numerous comments to the August 4 proposal were received from industry, trade associations, and governmental agencies. Responses to the more significant comments are set forth at the end of this preamble.

The consolidated rules are designed to accomplish two purposes. The first is the development of a common set of procedural rules for several programs in order to reduce paperwork, inconsistency, and the burden on persons regulated. The second is the improvement of formal administrative adjudicatory procedures through substantive revisions.

The rules proposed here are similar to the rules which currently guide proceedings under section 14 of FIFRA, section 211(d) of the Clean Air Act, and section 105(a) of the Ocean Dumping Act. The major substantive revision to these rules is a shift in appellate jurisdiction. The responsibility for hearing appeals from initial decisions, default orders, and accelerated decisions has been shifted from the Regional Administrator to the Administrator. This change was made in order to foster consistency in Agency decision-making nationwide. In addition, consolidating appellate responsibility into a single office will facilitate the assembly and publication of civil penalty hearings decisions. The Regional Administrator, however, will retain the authority to issue consent orders finalizing agreements between parties.

Hearings under all but one of the four statutory provisions covered by these rules will be held in conformity with the adjudicatory hearing provisions of the Administrative Procedure Act (APA). The only exception is hearings to assess penalties for violating regulations on fuels or fuel additives under section 211 of the Clean Air Act. The reasons for concluding that the formal APA hearing requirements do not apply to this section were set forth at 40 FR 39963, August 29, 1975, when the original hearing rules under that section were promulgated.

Similarly, the rules providing for a formal hearing in connection with the assessment of penalties for violating FIFRA and for assessing penalties and revoking permits under the Ocean Dumping Act follow the previous EPA position on these questions in 39 FR 27657, July 31, 1974, and 42 FR 60702, November 28, 1977, except that the Ocean Dumping Procedures have been rewritten to conform literally to the APA.

For a further exposition of the reasoning underlying the approach taken in these final rules, see the responses to significant comments below.

Responses to Significant Comments

Qualifications of Office

1. Comment: Several commenters suggested that the Judicial Officer be subject to the same restrictions concerning conflicts of interest as is a Regional Judicial Officer.

Response: The Agency agrees with this comment. Section 22.04(b)(2) has been rewritten to provide that the Judicial Officer and the ten Regional Judicial Officers must all conform to the

Administrative Procedure Act section 554(d) prohibition against blending the prosecutorial and decision-making functions.

Accelerated Decisions

2. Comment: The grounds for granting a motion for an accelerated decision under § 22.20 are unclear. The section confuses summary judgment and involuntary dismissal situations, and contains the vague criterion of "such other reasons as are just."

Response: The Agency agrees with this comment, and has rewritten the section accordingly, separating an accelerated decision from a decision to dismiss. A party will be entitled to an accelerated decision upon a showing that there exists no genuine issue of material fact and that the party is entitled to judgment as a matter of law. The Presiding Officer may dismiss the complaint on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

Official Notice

3. Comment: Several commenters took exception to the provision in § 22.22(f) which authorized the trier of fact to take official notice of facts "within the specialized knowledge and experience of the Agency". The commenters argued that the consolidated rules should conform to the more restrictive Federal Rules of Evidence definition of judicial notice (Rule 201).

Response: The Agency believes that official notice under the Administrative Procedure Act was intended to be broader than judicial notice. The Attorney General's Manual on the Administrative Procedure Act (1947), citing the legislative history of the APA, states at pages 79–80, that:

> The process of official notice should not be limited to the traditional matters of judicial notice but extends properly to all matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge.

There are several cases upholding this interpretation of the APA, particularly within the context of Federal Trade Commission proceedings. (*See, for example, Brite Manufacturing Co. v. FTC*, 347 F.2d 477 (D.C. Cir. 1965)).

Respondents should not be prejudiced by Agency notice of facts within its specialized knowledge since they will be given adequate opportunity to show that such facts are erroneously noticed.

Excluded Evidence

4. Comment: Several commenters objected to the following language in § 22.23(b) of the August 4 Proposal:

> Where the Administrator decides that the ruling of the Presiding Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence or, where appropriate, the Administrator may evaluate such evidence in preparing his final order. If the Administrator in the preparation of his final order relies upon any evidence excluded at the hearing by the Presiding Officer, he shall explicitly identify in the final order any such excluded evidence relied upon and his reasons therefor.

The commenters argued that reliance by the Administrator on excluded evidence would violate section 556 of the APA, since (1) a party would not have the opportunity to explore and/or rebut the excluded evidence, and (2) the Administrator would be relying on evidence outside the record.

Response: The Agency accepts this comment. The language in § 22.23(b) following "* * * permit the taking of such evidence * * *" has been deleted.

Standard of Proof

5. Comment: One commenter took issue with the "preponderance of the evidence" standard prescribed for Agency adjudications in § 22.24 of the Consolidated Rules. The commenter offered that the proper standard is the APA section 556(d) requirement that a sanction be supported by "reliable, probative, and substantial evidence."

Response: The Agency disagrees with this comment. The language in section 556(d) quoted above goes to the scope of judicial review rather than to the degree of proof required at the hearing level. (*See Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966), interpreting similar language in the Immigration and Nationality Act).

The preponderance of the evidence standard is the proper yardstick in most non-criminal proceedings, and indeed, the Agency could require no lesser standard here (such as "substantial evidence"). "* * * In American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation * * * that the proceeding is administrative rather than judicial does not diminish this wholesome demand." *Charlton v. FTC*, 543 F. 2d 903, 907–8 (D.C. Cir. 1976), reviewing an order of the FTC suspending an attorney from practice before the Commission.

Amount of a Civil Penalty

6. Comment: Commenters argued, on ground of due process, that the Presiding Officer should not be allowed to raise a civil penalty from the amount recommended to be assessed in a complaint. Further, the Administrator should not be allowed to raise a penalty from the amount recommended to be assessed by the Presiding Officer.

Response: For the most part, the Agency disagrees with these positions. The Agency does agree, however, that neither the Presiding Officer nor the Administrator should raise any penalty in an action where the respondent has defaulted, and the Consolidated Rules have been modified accordingly.

In a contested civil penalty action, the dollar amounts contained in both the complaint and the initial decision are merely recommendations of penalties to be assessed. After an appeal, only the Administrator has the authority to actually *assess* a penalty.

A respondent

> Does not have any vested right to go to trial on the specific charge mentioned in the citation or to be free from exposure to a penalty in excess of that originally proposed.

Long Manufacturing Co, N.C., Inc. v. Occupational Safety and Health Review Commission, 554 F. 2d 903, 907 (8th Cir. 1977).

As long as the penalty imposed by the Administrator is within limits described by the statute and supported by substantial evidence, the penalty may exceed the amount proposed by the Presiding Officer. (*See Nees v. SEC*, 414 F. 2d 211, 217 (9th Cir. 1969).)

One commenter suggested that language in several of the statutes covered by the Consolidated Rules authorizing the Administrator to compromise, modify, remit, or mitigate penalties allowed the Administrator to only decrease penalties upon review of an initial decision. The Agency believes, however, that such language was intended to authorize the Administrator to assess a penalty less than the statutory maximum through settlement proceedings. Moreover, other federal agencies (e.g. the FCC and the CAB), have interpreted the mitigation clauses, such as that contained in TSCA section 16(a)(2)(C), to apply only to collection of those penalties which have already been assessed. Thus the Agency sees no legal obstacle barring either the Presiding Officer or the Administrator from raising a penalty recommended to be assessed at a previous stage in the adjudicatory process.

7. Comment: Numerous commenters objected to the requirement, contained in the Solid Waste Disposal Act Supplemental Rules of Practice (§ 22.36(h) of the August 4 proposal), that Presiding Officers must follow any civil penalty assessment guidelines

promulgated by the Administrator. The commenters argued that the amount of a penalty should rest in the discretion of the Presiding Officer. The commenters also felt that the penalty assessment guidelines should be made available before they submit to a provision such as that contained in § 22.36(h).

Response: Section 22.36(h) has been deleted from the final Consolidated Rules. The Agency may, however, resubmit such a provision for comment after penalty assessment guidelines have been published.

Issues on Appeal

8. Comment: Two comments suggested that the language in § 22.30(c) seemed to allow the Administrator to sua sponte order argument on appeal with respect to issues entirely new to the proceeding.

Response: Section 22.30(c) has been rewritten to more accurately reflect the intent of the Agency. Under the final Consolidated Rules, the Administrator, on appeal, may sua sponte order argument only with respect to those issues raised at the hearing. The Administrator will have the authority to remand the case to receive evidence relating to issues new to the proceeding.

Appellate Jurisdiction

9. Comment: Two commenters contested the shift in appellate jurisdiction from the Regional Administrators to the Administrator. They felt that such a change from existing civil penalty procedures would result in delay and would not allow the appellate decision to adequately reflect the needs of the region.

Response: The Agency disagrees with this comment. The change in jurisdiction will:

(1) Foster consistency in agency decision-making,

(2) Centralize appellate responsibility, so that a small number of EPA personnel become proficient in hearing appeals from administrative adjudications. The centralization should result in a net savings of time and effort to all parties, and

(3) Bring a greater degree of separation of functions to the administrative process.

The increased quality and efficiency of the appellate process should outweigh any small delays which may result from this change. Moreover, parties have ample opportunity to bring issues of a regional nature to the attention of the Administrator.

Staying the Final Order

10. Comment: Two commenters argued that a final order should automatically be stayed upon the filing of a motion to reconsider under § 22.32. The commenters envisioned a scenario in which a respondent would be forced to comply with a final order, and then would later prevail on his motion to reconsider.

Response: Although cognizant of the problem raised by the commenters, the Agency has elected not to provide for automatic stays. The Agency is concerned over the possibility that motions to reconsider will be used to bring about unnecessary delay. The Administrator is authorized, however, to order stays in order to avoid any hardship to the respondent which may result from what proves to be premature compliance.

Deadlines and Time Requirements

11. Comment: Several comments were received which objected to the brevity of the time periods prescribed in the Consolidated Rules.

Response: EPA has agreed to expand the deadline, from 15 days to 20 days:

(1) For filing an answer to an amended complaint under § 22.14(d);

(2) For filing an answer to the original complaint under § 22.15(a); and

(3) For notifying the parties of a hearing prior to the date set for the hearing under § 22.21(b).

The times for filing responses to motions under § 22.16(b) (10 days), proposed findings of fact under § 22.26 (20 days) and motions to reconsider the final order under § 22.32 (10 days) have remained unchanged. These time periods have been found to be satisfactory in cases arising under EPA and other federal agencies' rules of practice, and under the Federal Rules of Civil Procedure.

Permit Issuance

12. Comment: Two commenters took issue with language in the August 4 preamble which suggested that formal hearing procedures are not required for initial permit issuance under the Resource Conservation and Recovery Act (RCRA).

Response: A more detailed analysis of the procedural requirements for RCRA permit issuance can be found in the proposed Consolidated Permit Regulations, 44 FR 34244, 34264, June 14, 1979. Comments on the RCRA permit issuance program will be addressed in the final Consolidated Permit Regulations.

Discovery

13. Comment: Several commenters suggested that the Consolidated Rules spell out procedures for obtaining discovery, rather than relying on the broad language contained in § 22.04(c)(5).

Response: The Agency agrees with this comment, and has set forth rules governing discovery in § 22.19(f). The section is taken from the discovery provisions previously operable under the Clean Air Act section 211 regulation of fuels program (40 CFR Part 80.319(f) (1978)).

Miscellaneous

14. Comment and response: The Agency agrees with the following comments and has modified the Consolidated Rules accordingly:

Section 22.03(h). The definition of "final order" should be more specific.

Section 22.05(c)(5). A party submitting a document which is refused for filing should be allowed to amend and resubmit the document. The notice of refusal should set forth the ground therefor.

Section 22.14(d). The complainant should be allowed to amend the complaint as a matter of right only once before the answer is filed.

Section 22.15(c). The respondent should be the only party who is permitted to request a hearing.

Section 22.17. A party should be given an opportunity to show good cause why he or she committed the action which led to default. (see § 22.17(d)).

Section 22.19(b). EPA should clarify whether witnesses or documents can be introduced at trial without a preview of such evidence at the prehearing conference.

Section 22.19(c). Prehearing conferences which relate to settlement should never be transcribed.

Section 22.22(d). Affidavits should only be admissible in lieu of testimony in cases where the witness is unavailable under the applicable criteria set forth in Rule 804(a) of the Federal Rules of Evidence.

Note.—EPA has determined that this document does not contain a major proposal requiring preparation of a Regulatory Analysis under Executive Order No. 12044.

Accordingly, the new Part 22 set forth below is hereby added to 40 CFR under the authority of section 16 of the Toxic Substances Control Act, sections 211 and 301 of the Clean Air Act, sections 14 and 25 of the Federal Insecticide, Fungicide, and Rodenticide Act, sections 105 and 106 of the Marine Protection, Research, and Sanctuaries Act, and sections 2002 and 3006 of the Solid Waste Disposal Act.

Dated: March 17, 1980.
Douglas M. Costle,
Administrator.

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

§ 80.301-80.332 (Subpart D) [Revoked]

PART 166—RULES OF PRACTICE GOVERNING PROCEEDINGS CONDUCTED IN THE ASSESSMENT OF CIVIL PENALTIES UNDER THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, AS AMENDED [REVOKED]

PART 226—ASSESSMENT OF CIVIL PENALTIES AND REVOCATION AND SUSPENSION OF PERMITS UNDER SECTION 105 OF THE ACT [REVOKED]

1. 40 CFR 80.301–80.332 (Subpart D) and 40 CFR Parts 166 and 226 are revoked.

2. 40 CFR Part 22 is added to read as follows:

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION OR SUSPENSION OF PERMITS

Subpart A—General

Sec.
22.01 Scope of these rules.
22.02 Use of number and gender.
22.03 Definitions.
22.04 Powers and duties of the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, and Presiding Officer; disqualification.
22.05 Filing, service, and form of pleadings and documents.
22.06 Filing and service of rulings, orders and decisions
22.07 Computation and extension of time.
22.08 Ex parte discussion of proceeding.
22.09 Examination of documents filed.

Subpart B—Parties and Appearances

22.10 Appearances.
22.11 Intervention.
22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

22.13 Issuance of complaint.
22.14 Content and amendment of the complaint.
22.15 Answer to the complaint.
22.16 Motions.
22.17 Default order.
22.18 Informal settlement; consent agreement and order.
22.19 Prehearing conference.
22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedure

22.21 Scheduling the hearing.
22.22 Evidence.
22.23 Objections and offers of proof.
22.24 Burden of presentation; burden of persuasion.
22.25 Filing the transcript.
22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion To Reopen a Hearing

22.27 Initial decision.
22.28 Motion to reopen a hearing.

Subpart F—Appeals and Administrative Review

22.29 Appeal from or review of interlocutory orders or rulings.
22.30 Appeal from or review of initial decision.

Subpart G—Final Order on Appeal

22.31 Final order on appeal.
22.32 Motion to reconsider a final order.

Subpart H—Supplemental Rules

22.33 Supplemental rules of practice governing the administrative assessment of civil penalties under the Toxic Substances Control Act.
22.34 Supplemental rules of practice governing the administrative assessment of civil penalties under Title II of the Clean Air Act.
22.35 Supplemental rules of practice governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.
22.36 Supplemental rules of practice governing the administrative assessment of civil penalties and the revocation or suspension of permits under the Marine Protection, Research, and Sanctuaries Act.
22.37 Supplemental rules of practice governing the administrative assessment of civil penalties under the Solid Waste Disposal Act.
Appendix—Addresses of EPA Regional Offices.

Authority: Sec. 16 of the Toxic Substances Control Act; secs. 211 and 301 of the Clean Air Act; secs. 14 and 25 of the Federal Insecticide, Fungicide, and Rodenticide Act; secs. 105 and 106 of the Marine Protection, Research, and Sanctuaries Act; and secs. 2002 and 3008 of the Solid Waste Disposal Act.

Subpart A—General

§ 22.01 Scope of these rules.

(a) These rules of practice govern all adjudicatory proceedings for:

(1) The assessment of any civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 1361(a));

(2) The assessment of any civil penalty conducted under section 211 of the Clean Act Act as amended (42 U.S.C. 7545);

(3) The assessment of any civil penalty or for the revocation or suspension of any permit conducted under section 105 (a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a));

(4) The issuance of a compliance order or the assessment of any civil penalty conducted under section 3008 of the Solid Waste Disposal Act as amended (42 U.S.C. 6928);

(5) The assessment of any civil penalty conducted under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)).

(b) The Supplemental rules of practice set forth in subpart H establish rules governing these aspects of the proceeding in question which are not covered in Subparts A through G, and also specify procedures which supersede any conflicting procedures set forth in those subparts.

(c) Questions arising at any stage of the proceeding which are not addressed in these rules or in the relevant supplementary procedures shall be resolved at the discretion of the Administrator, Regional Administrator, or Presiding Officer, as appropriate.

§ 22.02 Use of number and gender.

As used in these rules of practice, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require.

§ 22.03 Definitions.

(a) The following definitions apply to Part 22:

"Act" means the particular statute authorizing the institution of the proceeding at issue.

"Administrative Law Judge" means an Administrative Law Judge appointed under 5 U.S.C. 3105 (see also Pub. L. 95–251, 92 Stat. 183).

"Administrator" means the Administrator of the United States Environmental Protection Agency or his delegate.

"Agency" means the United States Environmental Protection Agency.

"Complainant" means any person authorized to issue a complaint on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be the Judicial Officer, Regional Judicial Officer, or any other person who will participate or advise in the decision.

"Complaint" means a written communication, alleging one or more violations of specific provisions of the Act, or regulations or a permit promulgated thereunder, issued by the complainant to a person under §§ 22.13 and 22.14.

"Consent Agreement" means any written document, signed by the parties, containing stipulations or conclusions of

fact or law and a proposed penalty or proposed revocation or suspension acceptable to both complainant and respondent.

"Final Order" means (a) an order issued by the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of a matter in controversy between the parties, or (b) an initial decision which becomes a final order under § 22.27(c).

"Hearing" means a hearing on the record open to the public and conducted under these rules of practice.

"Hearing Clerk" means the Hearing Clerk, A-110, United States Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

"Initial Decision" means the decision issued by the Presiding Officer based upon the record of the proceedings out of which it arises.

"Judicial Officer" means the person designated by the Administrator under § 22.04(b) to serve as the Judicial Officer.

"Party" means any person that participates in a hearing as complainant, respondent, or intervenor.

"Permit" means a permit issued under Section 102 of the Marine Protection, Research, and Sanctuaries Act.

"Person" includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

"Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer, unless otherwise specified by any Supplemental Rules.

"Regional Administrator" means the Administrator of any Regional Office of the Agency or any officer or employee thereof to whom his authority is duly delegated. Where the Regional Administrator has authorized the Regional Judicial Officer to act, the term "Regional Administrator" shall include the Regional Judicial Officer. In a case where the complainant is the Assistant Administrator for Enforcement or his delegate, the term "Regional Administrator" as used in these rules shall mean the Administrator.

"Regional Hearing Clerk" means an individual duly authorized by the Regional Administrator to serve as hearing clerk for a given region. Correspondence may be addressed to the Regional Hearing Clerk, United States Environmental Protection Agency (address of Regional Office—see Appendix). In a case where the complainant is the Assistant Administrator for Enforcement or his delegate, the term "Regional Hearing Clerk" as used in these rules shall mean the Hearing Clerk.

"Regional Judicial Officer" means a person designated by the Regional Administrator under § 22.04(b) to serve as a Regional Judicial Officer.

"Respondent" means any person proceeded against in the complaint.

(b) Terms defined in the Act and not defined in these rules of practice are used consistent with the meanings given in the Act.

§ 22.04 Powers and duties of the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, and Presiding Officer; disqualification.

(a) *Administrator and Regional Administrator.* The Administrator and the Regional Administrator shall exercise all powers and duties as prescribed or delegated under the Act and these rules of practice.

(b) *Judicial Officer and Regional Judicial Officer.*—(1) *Office.* One or more Judicial Officers may be designated by the Administrator to perform the functions described below. One or more Regional Judicial Officers may be designated by the Regional Administrator to perform, within the region of their designation, the functions described below.

(2) *Qualifications.* A Judicial Officer or a Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or some other Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not be employed by the Region's Enforcement Division or by the Regional Division directly associated with the type of violation at issue in the proceeding. A Judicial Officer shall not be employed by the Office of Enforcement or by any program office directly associated with the type of violation at issue in the proceeding. Neither the Judicial Officer nor the Regional Judicial Officer shall have performed prosecutorial or investigative functions in connection with any hearing in which he serves as Judicial Officer or any factually related hearing.

(3) *Functions.* The Administrator may delegate to the Judicial Officer, or the Regional Administrator may delegate to the Regional Judicial Officer, all or part of his authority to act in a given proceeding. This delegation does not prevent the Judicial Officer or Regional Judicial Officer from referring any motion or case to the Administrator or Regional Administrator when appropriate. The Judicial Officer and Regional Judicial Officer shall exercise all powers and duties prescribed or delegated under the Act or these rules of practice.

(c) *Presiding Officer.* The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer shall have authority to:

(1) Conduct administrative hearings under these rules of practice;

(2) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other nonprivileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

(d) *Disqualification; withdrawal.* (1) The Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer or Presiding Officer may not perform functions provided for in these rules of practice regarding any matter in which they (i) have a financial interest or (ii) have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion made to the Regional Administrator request that the Regional Judicial Officer be disqualified from the proceeding. Any party may at any time by motion to the Administrator request that the Regional Administrator, Judicial Officer, or Presiding Officer be disqualified or request that the Administrator disqualify himself from the proceeding. The Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer or Presiding Officer may at any time withdraw from any proceeding in which they deem

themselves disqualified or unable to act for any reason.

(2) If the Administrator, Regional Administrator, Regional Judicial Officer, Judicial Officer, or Presiding Officer is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned to replace him. Assignment of a replacement for the Regional Administrator or Judicial Officer, or for the Regional Judicial Officer shall be made by the Administrator or the Regional Administrator, respectively. The Administrator, should he withdraw or disqualify himself, shall assign the Regional Administrator from the region where the case originated to replace him. If that Regional Administrator would himself be disqualified, the Administrator shall assign a Regional Administrator from another region to replace the Administrator. The Regional Administrator shall assign a new Presiding Officer if the original Presiding Officer was not an Administrative Law Judge. The Chief Administrative Law Judge shall assign a new Presiding Officer from among available Administrative Law Judges if the original Presiding Officer was an Administrative Law Judge.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

§ 22.05 Filing, service, and form of pleadings and documents.

(a) *Filing of pleadings and documents.* (1) Except as otherwise provided, the original and one copy of the complaint, and the original of the answer and of all other documents served in the proceeding shall be filed with the Regional Hearing Clerk.

(2) A certificate of service shall accompany each document filed or served. Except as otherwise provided, a party filing documents with the Regional Hearing Clerk, after the filing of the answer, shall serve copies thereof upon all other parties and the Presiding Officer. The Presiding Officer shall maintain a duplicate file during the course of the proceeding.

(3) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be sent to the Regional Hearing Clerk, a copy shall be maintained by the Presiding Officer in the duplicate file, and a copy shall be sent to all parties. Parties who correspond directly with the Presiding Officer shall in addition to serving all other parties send a copy of all such correspondence to the Regional Hearing Clerk. A certificate of service shall accompany each document served under this subsection.

(b) *Service of pleadings and documents.*—(1) *Service of complaint.* (i) Service of a copy of the signed original of the complaint, together with a copy of these rules of practice, may be made personally or by certified mail, return receipt requested, on the respondent (or his representative).

(ii) Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name shall be made by personal service or certified mail, as prescribed by paragraph (b)(1)(i) of this section, directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by Federal or State law to receive service of process.

(iii) Service upon an officer or agency of the United States shall be made by delivering a copy of the complaint to the officer or agency, or in any manner prescribed for service by applicable regulations. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii) of this section.

(iv) Service upon a State or local unit of government, or a State or local officer, agency, department, corporation or other instrumentality shall be made by serving a copy of the complaint in the manner prescribed by the law of the State for the service of process on any such persons, or:

(A) If upon a State or local unit of government, or a State or local department, agency, corporation or other instrumentality, by delivering a copy of the complaint to the chief executive officer thereof;

(B) If upon a State or local officer by delivering a copy to such officer.

(v) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed return receipt. Such proof of service shall be filed with the complaint immediately upon completion of service.

(2) *Service of documents other than complaint, rulings, orders, and decisions.* All documents other than the complaint, rulings, orders, and decisions, may be served personally or by certified or first class mail.

(c) *Form of pleadings and documents.*—(1) Except as provided herein, or by order of the Presiding Officer or Administrator, there are no specific requirements as to the form of documents.

(2) The first page of every pleading, letter, or other document shall contain a caption identifying the respondent and the docket number which is exhibited on the complaint.

(3) The original of any pleading, letter or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter or other document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Regional Hearing Clerk, Presiding Officer, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules.

(5) The Administrator, Regional Administrator, Presiding Officer, or Regional Hearing Clerk may refuse to file any document which does not comply with this paragraph. Written notice of such refusal, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any document refused for filing upon motion granted by the Administrator, Regional Administrator, or Presiding Officer, as appropriate.

§ 22.06 Filing and service of rulings, orders, and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator, Regional Judicial Officer, or Presiding Officer, as appropriate, shall be filed with the Regional Hearing Clerk. All such documents issued by the Administrator or Judicial Officer shall be filed with the Hearing Clerk. Copies of such rulings, orders, decisions, or other documents shall be served personally, or by certified mail, return receipt requested, upon all parties by the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, or Presiding Officer, as appropriate.

§ 22.07 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins

to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or legal holiday, the stated time period shall be extended to include the next business day.

(b) *Extensions of time.* The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (2) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(c) *Service by mail.* Service of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document.

§ 22.08 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

§ 22.09 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours, inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk or Hearing Clerk, as appropriate.

(b) The cost of duplicating documents filed in any proceeding shall be borne by the person seeking copies of such documents. The Agency may waive this cost in appropriate cases.

Subpart B—Parties and Appearances

§ 22.10 Appearances.

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

§ 22.11 Intervention.

(a) *Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the foregoing sentence and paragraph (c) of this section, within ten (10) days after service of the motion for leave to intervene.

(b) *When filed.* A motion for leave to intervene in a proceeding must ordinarily be filed before the first prehearing conference or, in the absence of a prehearing conference, before the initiation of correspondence under § 22.19(e), or if there is no such correspondence, prior to the setting of a time and place for a hearing. Any motion filed after that time must include, in addition to the information set forth in paragraph (a) of this section, a statement of good cause for the failure to file in a timely manner. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding.

(c) *Disposition.* Leave to intervene may be granted only if the movant demonstrates that (1) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (2) the movant will be adversely affected by a final order; and (3) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(d) *Amicus curiae.* Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings docketed under these rules of practice where (1) there exists common parties or common questions of fact or law, (2) consolidation would expedite and simplify consideration of the issues, and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

(b) *Severance.* The Presiding Officer may, by motion or sua sponte, for good cause shown order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Issuance of complaint.

If the complainant has reason to believe that a person has violated any provision of the Act, or regulations promulgated or a permit issued under the Act, he may institute a proceeding for the assessment of a civil penalty by issuing a complaint under the Act and these rules of practice. If the complainant has reason to believe that

(a) A permittee violated any term or condition of the permit, or

(b) A permittee misrepresented or inaccurately described any material fact in the permit application or failed to disclose all relevant facts in the permit application, or

(c) Other good cause exists for such action, he may institute a proceeding for the revocation or suspension of a permit by issuing a complaint under the Act and these rules of practice. A complaint may be for the suspension or revocation of a permit in addition to the assessment of a civil penalty.

§ 22.14 Content and amendment of the complaint.

(a) *Complaint for the assessment of a civil penalty.* Each complaint for the assessment of a civil penalty shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated;

(3) A concise statement of the factual basis for alleging the violation;

(4) The amount of the civil penalty which is proposed to be assessed;

(5) A statement explaining the reasoning behind the proposed penalty;

(6) Notice of respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the amount of the proposed penalty.

A copy of these rules of practice shall accompany each complaint served.

(b) *Complaint for the revocation or suspension of a permit.* Each complaint for the revocation or suspension of a permit shall include:

(1) A statement reciting the section(s) of the Act, regulations, and/or permit authorizing the issuance of the complaint;

(2) Specific reference to each term or condition of the permit which the respondent is alleged to have violated, to each alleged inaccuracy or misrepresentation in respondent's permit application, to each fact which the respondent allegedly failed to disclose in his permit application, or to other reasons which form the basis for the complaint;

(3) A concise statement of the factual basis for such allegations;

(4) A request for an order to either revoke or suspend the permit and a statement of the terms and conditions of any proposed partial suspension or revocation;

(5) A statement indicating the basis for recommending the revocation, rather than the suspension, of the permit, or vice versa, as the case may be;

(6) Notice of the respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the proposed revocation or suspension.

A copy of these rules of practice shall accompany each complaint served.

(c) *Derivation of proposed civil penalty.* The dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act.

(d) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate. Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file his answer.

(e) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice, only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate.

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent (1) contests any material fact upon which the complaint is based; (2) contends that the amount of the penalty proposed in the complaint or the proposed revocation or suspension, as the case may be, is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the Regional Hearing Clerk. Any such answer to the complaint must be filed with the Regional Hearing Clerk within twenty (20) days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue, and (3) whether a hearing is requested.

(c) *Request for hearing.* A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§ 22.16 Motions.

(a) *General.* All motions, except those made orally on the record during a hearing, shall (1) be in writing; (2) state the grounds therefor with particularity; (3) set forth the relief or order sought; and (4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by § 22.05(b)(2).

(b) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(c) *Decision.* Except as provided in § 22.04(d)(1) and § 22.28(a), the Regional Administrator shall rule on all motions filed or made before an answer to the complaint is filed. The Administrator shall rule on all motions filed or made after service of the initial decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

§ 22.17 Default order.

(a) *Default.* A party may be found to be in default (1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer; or (3) after motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown. No finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the Presiding Officer to establish a prima facie case against the respondent. Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged

defaulting party shall have twenty (20) days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default. If the complaint is for the revocation or suspension of a permit, the conditions of revocation or suspension proposed in the complaint shall become effective without further proceedings on the date designated by the Administrator in his final order issued upon default. Default by the complainant shall result in the dismissal of the complaint with prejudice.

(b) *Procedures upon default.* When Regional Administrator or Presiding Officer finds a default has occurred, he shall issue a default order against the defaulting party. This order shall constitute the initial decision, and shall be filed with the Regional Hearing Clerk.

(c) *Contents of a default order.* A default order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed or the terms and conditions of permit revocation or suspension, as appropriate.

(d) For good cause shown the Regional Administrator or the Presiding Officer, as appropriate, may set aside a default order.

§ 22.18 Informal settlement; consent agreement and order.

(a) *Settlement policy.* The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The respondent may confer with complainant concerning settlement whether or not the respondent requests a hearing. Settlement conferences shall not affect the respondent's obligation to file a timely answer under § 22.15.

(b) *Consent agreement.* The parties shall forward a written consent agreement and a proposed consent order to the Regional Administrator whenever settlement or compromise is proposed. The consent agreement shall state that, for the purpose of this proceeding, respondent (1) admits the jurisdictional allegations of the complaint; (2) admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; and (3) consents to the assessment of a stated civil penalty or to the stated permit revocation or suspension, as the case may be. The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.

(c) *Consent order.* No settlement or consent agreement shall dispose of any proceeding under these rules of practice without a consent order from the Regional Administrator. In preparing such an order, the Regional Administrator may require that the parties to the settlement appear before him to answer inquiries relating to the consent agreement or order.

§ 22.19 Prehearing conference.

(a) *Purpose of prehearing conference.* Unless a conference appears unnecessary, the Presiding Officer, at any time before the hearing begins, shall direct the parties and their counsel or other representatives to appear at a conference before him to consider:

(1) The settlement of the case;

(2) The simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

(5) The limitation of the number of expert or other witnesses;

(6) Setting a time and place for the hearing; and

(7) Any other matters which may expedite the disposition of the proceeding.

(b) *Exchange of witness lists and documents.* Unless otherwise ordered by the Presiding Officer, each party at the prehearing conference shall make available to all other parties (1) the names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and (2) copies of all documents and exhibits which each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer. The Presiding Officer shall allow the parties reasonable opportunity to review new evidence.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conference shall be made unless ordered by the Presiding Officer upon motion of a party or sua sponte. The Presiding Officer shall prepare and file for the record a written summary of the action taken at the conference. The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, D.C., unless (1) the Presiding Officer determines that there is good cause to hold it at another location in a region or by telephone, or (2) the Supplemental rules of practice provide otherwise.

(e) *Unavailability of a prehearing conference.* If a prehearing conference is unnecessary or impracticable, the Presiding Officer, on motion or sua sponte, may direct the parties to correspond with him to accomplish any of the objectives set forth in this section.

(f) *Other discovery.* (1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value.

(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) Any party to the proceeding desiring an order of discovery shall make a motion therefor. Such a motion shall set forth:

(i) The circumstances warranting the taking of the discovery;

(ii) The nature of the information expected to be discovered; and

(iii) The proposed time and place where it will be taken. If the Presiding Officer determines that the motion should be granted, he shall issue an order for the taking of such discovery

together with the conditions and terms thereof.

(4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to (i) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or

(ii) The issuance of a default order under § 22.17(a).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. In addition, the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedure

§ 22.21 Scheduling the hearing.

(a) When an answer is filed, the Regional Hearing Clerk shall forward the complaint, the answer, and any other documents filed thus far in the proceeding to the Chief Administrative Law Judge who shall assign himself or another Administrative Law Judge as Presiding Officer, unless otherwise provided in the Supplemental rules of practice. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* If the respondent requests a hearing in his answer, or one is ordered by the Presiding Officer under § 22.15(c), the Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing. The Presiding Officer may issue the notice of hearing at any appropriate time, but not later than twenty (20) days prior to the date set for the hearing.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

§ 22.22 Evidence.

(a) *General.* The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall preserve the confidentiality of trade secrets and other commercial and financial information. The confidential or trade secret status of any information shall not, however, preclude its being introduced into evidence. The Presiding Officer may make such orders as may be necessary to consider such evidence *in camera*, including the preparation of a supplemental initial decision to address questions of law, fact, or discretion which arise out of that portion of the evidence which is confidential or which includes trade secrets.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules of practice or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Verified statements.* The Presiding Officer may admit an insert into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offer of proof.* Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded. Where the Administrator decides that the ruling of the Presiding Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

§ 22.24 Burden of presentation; burden of persuasion.

The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the

complaint and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript order to be kept confidential by the Presiding Officer.

§ 22.26 Proposed findings, conclusions, and order.

Within twenty (20) days after the parties are notified of the availability of the transcript, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer, proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a time by which reply briefs must be submitted. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial decision.

(a) *Filing and contents.* The Presiding Officer shall issue and file with the Regional Hearing Clerk his initial decision as soon as practicable after the period for filing reply briefs under § 22.26 has expired. The Presiding Officer shall retain a copy of the complaint in the duplicate file. The initial decision shall contain his findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, a recommended civil penalty assessment, if appropriate, and a proposed final order. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward a copy to all parties, and shall send the original, along with the record of the proceeding, to the Hearing Clerk. The Hearing Clerk shall forward a copy of the initial decision to the Administrator.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Administrator within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Administrator is taken from it by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the initial decision.

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be made no later than twenty (20) days after service of the initial decision on the parties and shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within ten (10) days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties an answer thereto. The Presiding Officer shall announce his intent to grant or deny such motion as soon as practicable thereafter. The conduct of any proceeding which may be required as a result of the granting of any motion allowed in this section shall be governed by the provisions of the applicable sections of these rules. The filing of a motion to reopen a hearing shall automatically stay the running of all time periods specified under these Rules until such time as the motion is denied or the reopened hearing is concluded.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Except as provided in this section, appeals to the Administrator shall obtain as a matter of right only from a default order, an accelerated decision or decision to dismiss issued under § 22.20(b)(1), or an initial decision rendered after an evidentiary hearing. Appeals from other orders or rulings shall lie only if the Presiding Officer or Regional Administrator, as appropriate, upon motion of a party, certifies such orders or rulings to the Administrator on appeal. Requests for such certification shall be filed in writing within six (6) days of notice of the ruling or service of the order, and shall state briefly the grounds to be relied upon on appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may certify any ruling for appeal to the Administrator when (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

(c) *Decision.* If the Administrator determines that certification was improvidently granted, or if he takes no action within thirty (30) days of the certification, the appeal is dismissed. When the Presiding Officer declines to certify an order or ruling to the Administrator on interlocutory appeal, it may be reviewed by the Administrator only upon appeal from the initial decision, except when the Administrator determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be made within six (6) days of service of an order of the Presiding Officer refusing to certify a ruling for interlocutory appeal to the Administrator. Ordinarily, the interlocutory appeal will be decided on

the basis of the submissions made by the Presiding Officer. The Administrator may, however, allow further briefs and oral argument.

(d) *Stay of proceedings.* The Presiding Officer may stay the proceedings pending a decision by the Administrator upon an order or ruling certified by the Presiding Officer for an interlocutory appeal. Proceedings will not be stayed except in extraordinary circumstances. Where the Presiding Officer grants a stay of more than thirty (30) days, such stay must be separately approved by the Administrator.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Any party may appeal any adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Hearing Clerk and upon all other parties and amicus curiae within twenty (20) days after the initial decision is served upon the parties. The notice of appeal shall set forth alternative findings of fact, alternative conclusions regarding issues of law or discretion, and a proposed order together with relevant references to the record and the initial decision. The appellant's brief shall contain a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review, argument on the issues presented, and a short conclusion stating the precise relief sought, together with appropriate references to the record.

(2) Within fifteen (15) days of the service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or amicus curiae may file and serve with the Hearing Clerk a reply brief responding to argument raised by the appellant, together with references to the relevant portions of the record, initial decision, or opposing brief. Reply briefs shall be limited to the scope of the appeal brief. Further briefs shall be filed only with the permission of the Administrator.

(b) *Sua sponte review by the Administrator.* Whenever the Administrator determines sua sponte to review an initial decision, the Hearing Clerk shall serve notice of such intention on the parties within forty-five (45) days after the initial decision is served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the service and filing of briefs.

(c) *Scope of appeal or review.* The appeal of the initial decision shall be limited to those issues raised by the parties during the course of the proceeding. If the Administrator determines that issues raised, but not appealed by the parties, should be argued, he shall give counsel for the parties reasonable written notice of such determination to permit preparation of adequate argument. Nothing herein shall prohibit the Administrator from remanding the case to the Presiding Officer for further proceedings.

(d) *Argument before the Administrator.* The Administrator may, upon request of a party or sua sponte, assign a time and place for oral argument after giving consideration to the convenience of the parties.

Subpart G—Final Order on Appeal

§ 22.31 Final order on appeal.

(a) *Contents of the final order.* When an appeal has been taken or the Administrator issues a notice of intent to conduct review sua sponte, the Administrator shall issue a final order as soon as practicable after the filing of all appellate briefs or oral argument, whichever is later. The Administrator shall adopt, modify or set aside the findings and conclusions contained in the decision or order being reviewed, and shall set forth in the final order the reasons for his actions. The Administrator may, in his discretion, increase or decrease the assessed penalty from the amount recommended to be assessed in the decision or order being reviewed, except that if the order being reviewed is a default order, the Administrator may not increase the amount of the penalty.

(b) *Payment of a civil penalty.* The respondent shall pay the full amount of the civil penalty assessed in the final order within sixty (60) days after receipt of the final order unless otherwise agreed by the parties. Payment shall be made by forwarding to the Regional Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the Treasurer, United States of America.

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall not stay the effective date of the final order unless specifically so ordered by the Administrator.

Subpart H—Supplemental Rules

§ 22.33 Supplemental rules of practice governing the administrative assessment of civil penalties under the Toxic Substances Control Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding consolidated rules of practice (40 CFR Part 22), all formal adjudications for the assessment of any civil penalty conducted under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)). Where inconsistencies exist between these Supplemental rules and the Consolidated rules, (§§ 22.01–22.32), these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the agency.

§ 22.34 Supplemental rules of practice governing the administrative assessment of civil penalties under Title II of the Clean Air Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR Part 22), all formal adjudications for the assessment of any civil penalty conducted under Section 211 of the Clean Air Act as amended (42 U.S.C. 7445). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01–22.32), these Supplemental rules shall apply.

(b) *Headquarters enforcement.* Where the complainant is the Assistant Administrator for Enforcement or his delegate, the prehearing conference and hearing shall be held in Washington, DC, unless the Presiding Officer determines that there is good cause for it to be held at another location.

(c) *"Presiding Officer".* For purposes of hearings conducted pursuant to § 211

of the Clean Air Act, "Presiding Officer" means the Administrative Law Judge appointed under 5 U.S.C. 3105 (see also Pub. L. 95-251, 92 Stat. 183) or an attorney who is an employee or authorized representative of the Agency.

(d) *Assignment of a Presiding Officer.* Upon the filing of an answer, the Regional Hearing Clerk or Hearing Clerk, as appropriate, shall forward the complaint, answer, and any other documents filed thus far in the proceeding to the Regional Administrator or Administrator, respectively, who shall assign the Presiding Officer. The Regional Administrator or Administrator may, however, forward the case file to the Chief Administrative Law Judge and request that he assign an Administrative Law Judge as Presiding Officer. If the Chief Administrative Law Judge finds that such an assignment can be made without impairing the ability of his office to timely discharge its other responsibilities, he shall make the assignment. Otherwise, he shall notify the Regional Administrator or Administrator that he is unable to make such an assignment. The Presiding Officer assigned to the proceeding shall obtain the case file from the Chief Administrative Law Judge, Regional Administrator, or Administrator, as appropriate, and notify the parties of his assignment.

(e) *Evaluation of proposed civil penalty.* In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider (1) the gravity of the violation, (2) the size of respondent's business, (3) the respondent's history of compliance with the Act, (4) the action taken by respondent to remedy the specific violation, and (5) the effect of such proposed penalty on respondent's ability to continue in business. The Presiding Officer must also consider any guidelines for the Assessment of Civil Penalties issued under the Act.

§ 22.35 Supplemental rules of practice governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR Part 22), all formal adjudications for the assessment of any civil penalty conducted under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1261(a)). Where inconsistencies exist between these Supplemental rules and the Consolidated rules, (§§ 22.01-22.32), these Supplemental rules shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties.

(c) *Evaluation of proposed civil penalty.* In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider, in addition to the criteria listed in section 14(a)(3) of the Act, (1) respondent's history of compliance with the Act or its predecessor statute and (2) any evidence of good faith or lack thereof. The Presiding Officer must also consider the guidelines for the Assessment of Civil Penalties published in the Federal Register (39 FR 27711), and any amendments or supplements thereto.

§ 22.36 Supplemental rules of practice governing the administrative assessment of civil penalties and the revocation or suspension of permits under the Marine Protection, Research, and Sanctuaries Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR Part 22), all formal adjudications conducted under Section 105(a) or (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f)). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01-22.32), these Supplemental rules shall apply.

(b) *Additional criterion for the issuance of a complaint for the revocation or suspension of a permit.* In addition to the three criteria listed in 40 CFR 22.13 for issuing a complaint for the revocation or suspension of a permit, complaints may be issued on the basis of a person's failure to keep records and notify appropriate officials of dumping activities, as required by 40 CFR 224.1 and 223.2.

§ 22.37 Supplemental rules of practice governing the administrative assessment of civil penalties under the Solid Waste Disposal Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR Part 22), all proceedings to assess a civil penalty conducted under Section 3008 of the Solid Waste Disposal Act (42 U.S.C. 6928) (the "Act"). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01-22.32), these Supplemental rules shall apply.

(b) *Issuance of notice.* Whenever, on the basis of any information, the Administrator determines that any person is in violation of (1) any requirement of Subtitle C of the Act, (2) any regulation promulgated pursuant to Subtitle C of the Act, or (3) a term or condition of a permit issued pursuant to Subtitle C of the Act, the Administrator shall issue notice to the alleged violator of his failure to comply with such requirement, regulation or permit.

(c) *Content of notice.* Each notice of violation shall include:

(1) A specific reference to each provision of the Act, regulation, or permit term or condition which the alleged violator is alleged to have violated; and

(2) A concise statement of the factual basis for alleging such violation.

(d) *Service of notice.* Service of notice shall be made in accordance with § 22.05(b)(2) of the Consolidated Rules of Practice.

(e) *Issuance of the complaint.* (1) Except as provided in paragraph (e)(3) of this section, the complainant may issue a complaint whenever he has reason to believe that any violation extends beyond the thirtieth day after service of the notice of violation.

(2) The complaint shall include, in addition to the elements stated in § 22.14 of the Consolidated Rules, an order requiring compliance within a specified time period. The complaint shall be equivalent to the compliance order referred to in Section 3008 of the Act.

(3) Whenever a violation is of a non-continuous or intermittent nature, the Administrator may issue a complaint, without any prior notice to the violator, pursuant to § 22.14 of the Consolidated Rules of Practice which may also require the violator to take any and all measures necessary to offset all adverse effects to health and the environment created, directly or indirectly, as a result of the violation.

(4) Notwithstanding § 22.15(a), any answer to the complaint must be filed with the Regional Hearing Clerk within thirty (30) days after the filing of the complaint.

(f) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe with specificity the documents sought.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

Appendix—Addresses of EPA Regional Offices

Region I—John F. Kennedy Federal Building, Boston, Massachusetts 02203
Region II—26 Federal Plaza, New York, New York 10007
Region III—Curtis Building, 6th and Walnut Streets, Philadelphia, Pennsylvania 19106
Region IV—345 Courtland Street, NE, Atlanta, Georgia 30308
Region V—230 South Dearborn Street, Chicago, Illinois 60604
Region VI—First International Building, 1201 Elm Street, Dallas, Texas 75270
Region VII—1735 Baltimore Street, Kansas City, Missouri 64108
Region VIII—1860 Lincoln Street, Denver, Colorado 80203
Region IX—215 Fremont Street, San Francisco, California 94105
Region X—1200 6th Avenue, Seattle, Washington 98101

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residual pieces metered at the "all other" level rate.

(2) The entire mailing metered at the carrier route presort level rate, with additional postage for residual pieces paid by means of a meter strip affixed to the back of Form 3602-PC, *Statement of Mailing—Bulk Rates.*

b. Precanceled stamps or precanceled stamped envelopes (see 143).

c. Permit imprints (cash), (see 145).

PART 632—MAILING STATEMENT FOR BULK MAILINGS

6. Revise part 632 to read as follows:

632.1 Type of Mailing Statement Required

The mailer must complete and submit the appropriate mailing statement with each mailing:

a. Form 3602, *Statement of Mailing Matter with Permit Imprints*, for mail with permit imprints (see 145); or

b. Form 3602-PC, *Statement of Mailing—Bulk Rates*, for mail bearing precanceled stamps or meter stamps.

Note.—All mailing statements are subject to verification by the Postal Service.

632.2 Preparation of Form 3602 for Carrier Route Presort Level Rate Mailings

Postage for carrier route presort level rate mailings paid for by permit imprint is computed in the following manner on Form 3602:

a. Enter the total number of pieces or pounds (including residual) and multiply by the appropriate "all other" level per piece or per pound rate.

b. Enter the total number of qualifying carrier route presorted pieces and multiply by the applicable per piece rate reduction.

c. Subtract the result in step b. from that in step a.

A transmittal letter making these changes in the pages of the Domestic Mail Manual will be published and will be transmitted to subscribers automatically. Notice of these changes will be published in the Federal Register as provided in 39 CFR 111.3 (39 U.S.C. 401(2), 404(2)).

W. Allen Sanders,

Associate General Counsel, General Law and Administration.

[FR Doc. 80-37333 Filed 12-1-80; 8:45 am]

BILLING CODE 7710-12-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 22

[EN-FRC 1669-5]

Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties and Revocation or Suspension of Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Suspension of portion of final rule.

SUMMARY: This action suspends those provisions of the Consolidated Rules of Practice which require that, prior to issuing a compliance order under the Solid Waste Disposal Act, the Administrator of EPA provide notice to the violator and allow a thirty day period for compliance. These requirements were formerly found in § 3003 of the Act but were eliminated by the Solid Waste Disposal Act Amendments of 1980. This suspension permits compliance orders to be issued in the manner now set forth in the Act.

EFFECTIVE DATE: December 2, 1980.

FOR FURTHER INFORMATION CONTACT: Philip Savitz, Office of Enforcement (EN-338), Washington, D.C. 20460, (202) 755-0994.

SUPPLEMENTARY INFORMATION: Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6928, provides that whenever the Administrator of the Environmental Protection Agency determines that any person is in violation of any requirement of Subtitle C of the Act, the Administrator may issue an order requiring compliance and assessing a penalty. As originally worded, § 3008 required that the Administrator, prior to issuing such order, provide notice to the violator of his/her failure to comply with the requirements of the Act. If the violation extended beyond the thirtieth day after notice was given, an order could then be issued.

On October 21, 1980, the President signed into law the Solid Waste Disposal Act Amendments of 1980. Section 3008 was amended to delete the requirements that the Administrator provide notice of the violation and a thirty day period for compliance prior to issuing an order. The section was also amended to specify that the order can require immediate compliance.

In the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 CFR Part 22, adopted on April 9, 1980, EPA set forth the procedures it will use in the assessment of penalties under several acts. Rules governing orders issued under § 3008 of the Solid Waste Disposal Act are set forth in 40 CFR 22.37. This provision reflects the language of § 3008 as formerly written.

In order that a procedure consistent with the amendments to § 3008 may be implemented as soon as possible, those portions of 40 CFR 22.37 requiring a notice of violation and thirty day period for compliance prior to the issuance of an order are hereby suspended.

It is anticipated that in the near future EPA will publish a proposed rulemaking which would amend the Consolidated Rules of Practice to address these and other issues.

§ 22.37 [Partially suspended]

In 40 CFR 22.37, paragraphs (b), (c), (d) and subparagraphs (1) and (3) of paragraph (e) are suspended until further notice.

This suspension is issued under authority of the Solid Waste Disposal Act, 42 U.S.C. 6901, et seq.

Dated: November 25, 1980.

Douglas M. Costle,

Administrator.

[FR Doc. 80-37337 Filed 12-1-80; 8:45 am]

BILLING CODE 6560-33-M

40 CFR Part 52

[A-7-FRL 1689-4]

Revision to State Implementation Plan for Kansas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rulemaking.

SUMMARY: The EPA proposed in the February 11, 1980 Federal Register (45 FR 9012) to approve an 18-month extension until July 1, 1980, for the submission of an implementation plan to provide for attainment of the secondary particulate standard in Topeka. This notice describes the EPA's final action on the proposed extension.

DATES: This extension is approved effective December 31, 1980.

ADDRESSES: Copies of the state submission, the comments received on the proposed rulemaking and an evaluation document are available at the following locations:

Environmental Protection Agency, Region VII, 324 East 11th Street, Kansas City, Missouri 64106

Public Information Reference Unit, Environmental Protection Agency, 401